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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Utility Consumers' Action Network, Complainant, vs. SBC Communications, Inc. dba SBC Pacific Bell Telephone Company (U-1001-C) and related entities (collectively SBC), Defendants.	Case 05-11-011 (Filed November 14, 2005)
Utility Consumers' Action Network, Complainant, vs. Cox California Telecom II, LLC, doing business as Cox Communications, and related entities (collectively Cox), Defendants.	Case 05-11-012 (Filed November 14, 2005)

RESPONDING BRIEF OF COX CALIFORNIA TELCOM LLC (U-5684-C) IN RESPONSE TO ISSUES RAISED BY JOINT RULING DATED JUNE 26, 2006

July 31, 2006

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A. INTRODUCTION

Cox California Telcom, LLC (U-5684-C) (hereinafter "Cox") hereby submits its responding brief on the matters raised by the Joint Ruling of the Assigned Commissioner and the Presiding Officer, issued on June 26, 2006 (the "Joint Ruling"). This reply brief is submitted pursuant to the ALJ Ruling of July 12, 2006.

From the outset, UCAN's opening brief perplexes Cox. As a procedural matter, UCAN lacks standing in this matter to recommend that Cox be sanctioned. That is an issue for the Commission to address. Substantively and more importantly, UCAN has suffered no injury as a result of any Cox behavior about which it can complain. UCAN's motion to dismiss Cox in its complaint proceeding can reasonably be deemed an admission that Cox has violated no rule or regulation of the Commission and that UCAN has accordingly suffered no damage by Cox's behavior.[1]

Given the motion to dismiss, the Commission would be completely justified in ignoring the UCAN brief insofar as it addresses Cox. However, even if the Commission wishes to consider the filing by UCAN, that pleading should be recognized as a misguided effort to create some sort of aura of improper activity that did not occur. UCAN tries to tie together issues of timing and subject matter into what it presents as a calculated, deliberate effort to evade the *ex parte* rules. But UCAN's argument does not hold up under even the simplest scrutiny.

[1] Moreover, for UCAN now to suggest that it deserves reimbursement from Cox for its attorney fees for its voluntary – and inappropriate – participation in this proceeding, at least with respect to Cox, is entirely unreasonable.

As a fundamental matter, it does not matter if the complaint cases and the request for a rulemaking in a separate docket are about related issues. There must have been am actual discussion of the substantive issues at stake in the complaint cases for there to have been a violation of the *ex parte* rules. Yet is clear the two *ex parte* meetings that occurred here did not involve any such discussion. The evidence on this question is undisputed and as clear as can be.

Since such a discussion is the *sine qua non* of finding an *ex parte* violation, there cannot be a finding of a violation here. That should be the final determination of the Commission. Any finding to the contrary would be subject to immediate judicial review and a straightforward reversal.

Moreover, even if the Commission were to determine, despite the overwhelming evidence to the contrary, that the *ex parte* rules were somehow violated, it must find that any such violation was *de minimis* in nature. Indeed, the extensive efforts made by Cox and AT&T to inform the Commission advisors that the complaint cases were not to be discussed, and the offer to allow those advisors to cancel the meetings, is conduct directly contrary to UCAN's unsupported allegations that substantive issues in the complaint cases were discussed. Accordingly, any violation that might be found is certainly not one subject to sanctions by the Commission, much less the outrageous sanctions sought by UCAN.

The Commission should find there was no violation by Cox of the *ex parte* rules. If it does find such a violation, however, no sanctions are warranted.[2]

B. DISCUSSION

1. The Commission Can Not Find An *Ex Parte* Violation Based On How The Discussion Might "Affect" Another Proceeding

UCAN asserts that the discussions at the two meetings "indirectly" sought to "affect" the complaint cases.[3] This position is consistent with statements made by the ALJ and the Assigned Commissioner at the July 7 hearing, suggesting that the request for a rulemaking could have "implications" for the complaint cases.[4] Yet nowhere is there to be found any rule banning discussions that might have "implications" for another proceeding. The *ex parte* rule prohibits discussions of substantive issues, not discussions that might "affect" another proceeding in some amorphous way.

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[2] Cox also notes the AT&T argument that the process followed in this matter fails to afford due process of law to the participants. In this regard, Cox is concerned about the way this matter has proceeded. Cox does not believe that the Presiding Officer or the Assigned Commissioner meant to imply in the Joint Ruling[2] that Cox was guilty until proven innocent. However, that is a reasonable inference that one could draw from the Joint Ruling, and Cox finds it regrettable. Perhaps it is merely the unfortunate wording of an order to show cause that would lead one to such a conclusion. However, as a general rule the Commission should not preliminarily suggest that a party is "guilty" but that such a finding might be reversed once the facts are determined.

Apart from the wording of the Joint Ruling, the conduct of the July 7 hearing raised additional concerns. The Presiding Officer did not perform the ordinary role of an ALJ but in fact served as the lead questioner. At the very least, the Commission might have designated a member of its legal division or its general counsel's office to cross-examine Cox and AT&T witnesses.

Each of these items gives rise to due process concerns with the approach followed by the Commission in this matter.

[3] UCAN Opening Brief, p. 5.

[4] Transcript, July 7, 2006, pp. 8, 10. This implication also appeared in the Joint Ruling.

It is not enough that two proceedings be "related" in order to bar *ex parte* discussions in one because they might "affect" the other. Indeed, such a rule would be impossible to enforce in practice or in a fair manner, and the application of such a rule here would violate rules requiring the due process of law. The principle of due process is that a party cannot be punished for engaging in conduct that it had no way of knowing was improper. Given UCAN's theory, however, how could one ever determine if discussions in one case could have "implications" on a decisionmaker's thought process for another proceeding? The potential reach of such a rule would be limitless.

AT&T's discussion of the Consumer Bill of Rights proceeding is a vivid example of this point.[5] As AT&T correctly points out, the Bill of Rights proceeding lasted over a period of some six years and addressed almost every consumer issue possible related to the provision of telecommunications services. During that period the Commission heard and considered numerous complaint cases regarding allegations about services provided or not provided properly by telecommunications companies. Yet no one has ever suggested that the *ex parte* discussions held in the rulemaking on the Bill of Rights were improper because they could have "affected" a decisionmaker's thought processes on one or more of these complaint cases. Nevertheless, UCAN's theory here would have banned all of these *ex parte* discussions (or worse, found them, after the fact, to have been violations of the *ex parte* rules).

Such a result would be highly improper and legally wrong. The Commission hears many matters in rulemakings that are "related" in some way to matters in complaint cases. That does not require, nor even permit, a ban on *ex parte* discussions in the rulemaking

[5] AT&T Opening Brief, p. 12.

proceedings. Thus, the Commission cannot find a violation of its *ex parte* rules on the theory that discussions in a meeting could have "implications for" or could "affect" another proceeding. Such a rule would violate Cox's due process rights.

2. There Is Absolutely No Evidence That The *Ex Parte* Meetings Involved A Discussion of Substantive Issues In The Complaint Cases

UCAN attempts to avoid the fundamental problem with its argument by contending that the substantive issues in the complaint cases are something that they are not. It states:

> Based on the facts, the only question is whether these meetings involved "any substantive issue in a covered proceeding." Since the discussion involved Section 2883, what the exclusions are, why a rulemaking is preferable to a series of isolated actions, and even arguments made by Cox to ALJ Thorson, this issue should not be subject to dispute.[6]

Certainly UCAN's first statement is correct. That is the only question here. But the subsequent statement is simply wrong. The issues addressed in a request for a rulemaking go to the substantive question of whether a rulemaking proceeding is appropriate. In contrast, the issues addressed in a complaint proceeding involve the defendant's factual conduct and a determination as to whether that conduct violated the law. None of these issues regarding Cox's conduct were addressed in any way in the *ex parte* meetings.

In this regard, UCAN's attempt to rely on the *Central Lincoln* case[7] is wholly misplaced. The facts in that case could not be more different from those present here.

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[6] UCAN Opening Brief, p. 9.

[7] *Central Lincoln Peoples' Utilities District v. Johnson*, 735 F.2d 1101 (9th Cir. 1984), cited at UCAN Opening Brief, p. 10.

Central Lincoln involved a communication from the administrative agency to an industry participant. It involved an analysis of the *ex parte* rules in the Administrative Procedure Act, not those of the CPUC. And most importantly, it involved *ex parte* communications in the very ratemaking proceeding in which *ex parte* communications had been banned. These facts could not be more different from the present case.

Here, the communications were made by industry participants in a rulemaking proceeding, not by the agency itself. The issues involve the *ex parte* rules of this Commission, not those of the APA. And again, most importantly, the communications at issue here occurred in a proceeding wholly separate from the proceedings in which *ex parte* communications had been banned. These factual distinctions render *Central Lincoln* inapplicable to the present matter.

UCAN's reliance on *Central Lincoln* is based entirely on the assertion by UCAN that "the subject of the meetings and the subject of the present complaints are substantially related. . . ."[8] But this simply is not the test to be considered in evaluating a claim of an *ex parte* violation. Rather, the question is whether or not there was a discussion of substantive issues under consideration in the complaint cases. As has been explained over and over, there was not. Thus, UCAN has misstated the test and, having done so, has attempted to bypass the critical issue to be resolved.

Had Cox or AT&T gone into these meetings to discuss the substantive issues of the complaint cases, i.e. the factual allegations by UCAN that they had violated Section 2883, then UCAN might well have cause for concern. But plainly Cox and AT&T did not do this,

[8] UCAN Opening Brief, p. 11.

and UCAN has not even alleged that such discussions took place. Thus, UCAN's entire theory is defeated by the facts of what actually occurred.

UCAN's argument rests on the presumption that the two *ex parte* meetings involved a discussion of substantive issues at stake in the complaint cases. However, UCAN identifies only two "essential facts" to support this presumption:

> 4. At those meetings, defendants made statements they recognized could be interpreted to refer to the pending complaint proceedings (Evid. Hrg. Tr. 35)
>
> 5. Defendants conceded that initiating rulemaking proceedings could negatively affect the resolution of the pending complaints filed by UCAN, as dismissing or staying the pending complaint proceedings was a possibility or likelihood and had been requested (Evid. Hrg. Tr. 5, 21-22, 24-27, 39, 49, 50).[9]

While both of these factual statements are true, they do not show, in any way, that the *ex parte* meetings involved a discussion of the substantive issues at stake in the complaint cases.

Instead, these "essential facts" identified by UCAN do nothing more than show that the complaint cases and the motion for a rulemaking involved the same statutory interpretation issues. They do not demonstrate that the substantive issues of the complaint cases were discussed. Nor could they, since the undisputed evidence proves that Cox and AT&T went out of their way to inform the advisors that they could not discuss the substantive issues of the complaint cases due to the *ex parte* ban.[10]

As discussed above, it simply is not enough that the two proceedings address related issues. There must be a discussion about substantive issues in the proceeding in which *ex*

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[9] UCAN Opening Brief, p. 2.

[10] Exhibit 3, ¶¶ 10, 17; Exhibit 4, ¶¶ 10, 11, 15, 16 and 25.

parte communications are banned. In its opening brief, Cox identified the substantive issues under consideration in the complaint case filed against it by UCAN:

> The matters discussed at the June 14 and 15 meetings did not concern any conduct of Cox or AT&T. They did not concern any question about whether or not Cox or AT&T had violated § 2883 of the Public Utilities Code. They did not concern any of the factual allegations raised by UCAN in its complaints.[11]

These are the substantive issues that were to be addressed in the complaint proceedings.

By way of contrast, how does UCAN address the substantive issues at stake in the complaint cases? It actually does not do so. Instead, UCAN seeks to ascribe an "improper purpose" to the meetings, contending that this "purpose" somehow addresses the substantive issues in the complaint case. This is a stretch almost beyond imagination, demonstrating that UCAN is reaching for an argument that does not exist.

For example, UCAN does not assert that the participants in the *ex parte* meetings discussed their conduct as put at issue in the complaint case. It does not assert that the participants in the *ex parte* meetings discussed the merits of the allegations made by UCAN in the complaint case. It does not assert that the participants in the *ex parte* meetings discussed any of the factual issues that were to be decided in the complaint case. Nothing in UCAN's argument shows any evidence that the substantive issues of complaint cases were discussed at the *ex parte* meetings.

While Cox and AT&T did file a motion asking the Commission to stay the complaint cases pending the resolution of the request for a rulemaking, that motion for a stay was not a subject at all of the *ex parte* meetings. The undisputed testimony in this case is that none of the participants in the *ex parte* meetings discussed, in any manner, the motion for a stay

[11] Cox Opening Brief, p. 11.

filed in the complaint cases**.** The entire discussion was about the benefits the Commission and industry participants would gain from a rulemaking proceeding on PU Code § 2883. There simply was no mention of the factual issues at stake in the complaint cases.[12]

Thus, UCAN's entire argument rests on a wholly false presumption. It would have been more believable if UCAN could point to a single substantive issue of the complaint cases as a subject of discussion at the *ex parte* meetings. It did not, because it could not, so instead UCAN resorted to smoke and mirrors. UCAN has not identified a single piece of testimony to support its theory.

3. Even If The Commission Finds The *Ex Parte* Rule Was Violated, It Should Find That Any Such Violation Was *De Minimis* And Not Subject To Sanction

In reviewing this matter, the Commission must keep this matter in absolute perspective. Cox has explained in great detail, and the evidence clearly shows, that there was never any intent on anyone's part in this case to violate the *ex parte* rules. Cox and A&T went to great lengths to make certain that they were not violating the rules. They informed the Commission advisors with whom they were meeting that the complaint cases were pending but that they were not to be the subject of discussion in any manner. They even gave the advisors the clear option, at the very outset of each meeting, to call the

[12] Just because the participants in the meetings thought that the issuance of a rulemaking could lead to a stay or dismissal of the complaint cases, that does not mean that the issue of a stay or dismissal was discussed.

meeting off if they thought there was any issue with the rules. Of course, none of them did so.[13]

Under these circumstances, the Commission plainly should find that there was no violation of the *ex parte* rules. But even if, despite all of the overwhelming evidence, the Commission determines that the *ex parte* rules were somehow violated, it should find that there was, at worst, a *de minimis* violation, without any improper intent. Moreover, the Commission should determine that so *de minimis* a violation of the rules does not require that any sanction be imposed. There is no reason to impose any sort of sanction in the present case.

Such a conclusion is particularly appropriate in the present case where any possible violation was not apparent and certainly was not intended. It is especially true where two of the participants in the *ex parte* meetings were a Commissioner's Legal Advisor and a former Administrative Law Judge of the Commission. They were asked, at the time of the meetings, whether the meetings could go forward and, fully informed, they agreed to proceed.

By comparison, in D. 02-12-023, the Commission imposed a sanction on Pacific Bell and MCI WorldCom for violating Rule 7.c of the *ex parte* rules, by communicating with the Commissioners during the "quiet period" of a ratesetting deliberative meeting. At that time, both of the companies involved admitted engaging in the conduct that violated the rule. Pacific Bell, in fact, admitted that it had violated the *ex parte* rules.

[13] Here Cox agrees with the AT&T argument (at p. 13 of its Opening Brief) that the acts of the advisors should estop the Commission from even pursuing the issues raised here. Cox explicitly reserves the right to raise this estoppel argument in any further proceedings in this matter.

The Commission imposed a significantly larger fine on Pacific Bell in that case than it did on MCI WorldCom. In explaining its reasons for imposing such a sanction, the Commission stated as follows:

> Pacific does not deny that its contacts were in violation of Commission rules, although it suggests its actions were somehow warranted because of a perceived need to respond to an AT&T ex parte contact of two days prior. According to Pacific, "it was imperative to respond to Mr. Dorman's letters, which go way beyond the record in this proceeding and are inaccurate in important respects." (Pacific response, 5/28/02, p. 3.) From its own explanation, Pacific appears to believe that it should be the judge of when the record needs correcting and that it can, by itself, waive the Commission's ex parte rules in order to have the last word. This suggestion is, at best, misguided, and at worst, appalling.[14]

The facts could not be more different here. Cox does not concede that it violated the rules, and it firmly believes that it did not. It took every step that it could to make certain that its actions were not in violation of the Commission's rules. In such a circumstance, even if the Commission finds that a technical violation occurred, there should not be any sanction for this conduct.

Moreover, UCAN should not be permitted to ask that sanctions be imposed against Cox. UCAN has filed a motion with the Commission asking that its complaint against Cox be dismissed, plainly because UCAN has recognized that its complaint has no merit. Given that circumstance, UCAN could not possibly have been harmed by an action of Cox with respect to *ex parte* meetings. If UCAN does not even have a valid complaint against Cox, there can be no reason for it to complain about *ex parte* meetings. Again, at best, the violation, without any harm, was *de minimis*.

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[14] D. 02-12-023, p. 7. The much lesser fine imposed on MCI WorldCom was based on WorldCom's assertion that it was not familiar with the rules, and a finding that ignorance of the rules is not a sufficient basis to justify a violation. Id. By way of contrast, Cox has shown that it was familiar with the rules and that it made every effort to comply with those rules.

UCAN's argument for "maximum" sanctions should be rejected out of hand. As pointed out above, even UCAN's standing to participate in this matter is highly questionable. Nevertheless, if UCAN had standing to take part, it still could not demonstrate any harm, inasmuch as it has already sought Cox's dismissal from the complaint cases. In an amazing about face, UCAN has gone from essentially admitting that Cox's behavior did not violate the rules addressed in the complaint cases and that it had thereby suffered no injury to demanding huge fines and the recovery of attorney fees for *ex parte* contacts, despite the fact that such contacts did it no harm.

UCAN has not been harmed, and the Commission's processes have not been harmed. Given the facts as they have been presented, there is simply no basis for imposing a sanction on Cox.

C. CONCLUSION

There has been no violation of the *ex parte* rules. The record clearly shows that no discussion of the substantive issues of the complaint case took place. Additionally, Cox took every step it could to avoid even the suggestion that it was engaging in improper *ex parte* contacts, and still it has been called on the carpet. The Joint Ruling of June 26, and UCAN's vendetta here, both have the potential to stifle the free exchange of ideas that the Commission's rules allow, and call for, in quasi-legislative proceedings.

There was no violation by Cox of the *ex parte* rules in this matter. The Commission should issue an order so finding. However, if the Commission nevertheless determines

that a technical violation occurred, it should determine that it was *de minimis* and the Commission should not impose any sanctions.

Dated: July 31, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties for which an electronic mail address has been provided, this day served a true copy of the original attached **RESPONDING BRIEF OF COX CALIFORNIA TELCOM, LLC (U-5684-C) WITH RESPECT TO ISSUES RAISED BY JOINT RULING OF JUNE 26, 2006** on all parties of record in this proceeding or their attorneys of record.

Dated July 31, 2006 at Lafayette, California.

Joseph S. Faber

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California Telcom, LLC

CALIFORNIA PUBLIC UTILITIES COMMISSION
Service Lists
Proceeding: C0511011 - UCAN VS SBC COMMUNIC
Proceeding: C0511012 - UCAN VS COX CALIFORN
Filer: UTILITY CONSUMERS' ACTION NETWORK
List Name: LIST

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